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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 433.

EDWARD SMITH, PETITIONER,

vs.

THE UNITED STATES.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

PETITION FILED OCTOBER 31, 1896.

(17018)

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a Transcript of record. Court of appeals, District of Columbia. April term, 1898. No. 797. No. 9, special calendar. Edward Smith, appellant, vs. The United States. Appeal from the supreme court of the District of Columbia. Filed May 3, 1898.

1 In the court of appeals of the District of Columbia.

EDWARD SMITH, APPELLANT,
vs.
THE UNITED STATES. } No. 797.

Supreme court of the District of Columbia.

THE UNITED STATES
vs.
EDWARD SMITH. } No. 21518. Criminal.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Filed in open court December 31, 1897. J. R. Young, clerk.

In the supreme court of the District of Columbia, holding a criminal term, October term, A. D. 1897.

DISTRICT OF COLUMBIA, *ss:*

The grand jurors of the United States of America in and for the District of Columbia aforesaid upon their oath do present—

That one Edward Smith, late of the District aforesaid, on the fifteenth day of November, in the year of our Lord one thousand eight hundred and ninety-seven, with force and arms, at and in the District aforesaid, in and upon the body of one Edmonia Jackson, she, the said Edmonia Jackson, in the peace of God and of the said United States then and there being, feloniously, wilfully, and of his malice aforethought did make an assault, and that the said Edward Smith, with a certain hatchet of the value of one dollar, which said hatchet he, the said Edward Smith, in his right hand then and there had and held, the said Edmonia Jackson, in and upon the back side of the neck of her, the said Edmonia Jackson, then and there feloniously, wilfully, and of his malice aforethought did strike, thrust, and penetrate, giving to her, the said Edmonia Jackson, then and there, by such striking, thrusting, and penetrating aforesaid with the hatchet aforesaid, in and upon the back side of the neck of her, the said Edmonia Jackson, one mortal wound of the length of three inches and of the depth of two inches, of which said mortal wound she, the said Edmonia Jackson, then and there instantly died.

2 And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Edward Smith her, the said Edmonia Jackson,

in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought did kill and murder, against the form of the statute in such case made and provided and against the peace and Government of the said United States.

SECOND COUNT.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present—

That the said Edward Smith, late of the District aforesaid, on the fifteenth day of November, in the year of our Lord one thousand eight hundred and ninety-seven, with force and arms, at and in the District aforesaid, in and upon the body of one Edmonia Jackson, she, the said Edmonia Jackson, in the peace of God and of the said United States then and there being, feloniously, wilfully, and of his malice aforethought did make an assault, and that the said Edward Smith, with a certain knife of the value of one dollar, which said knife he, the said Edward Smith, in his right hand then and there had and held, the said Edmonia Jackson, in and upon the back side of the neck of her, the said Edmonia Jackson, then and there feloniously, wilfully, and of his malice aforethought did strike, cut, and penetrate, giving to her, the said Edmonia Jackson, then and there, by such striking, cutting, and penetrating aforesaid with the knife aforesaid, in and upon the back side of the neck of her, the said Edmonia Jackson, one mortal wound of the length of three inches and of the depth of two inches, of which said mortal wound she, the said Edmonia Jackson, then and there instantly died.

And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Edward Smith her, the said Edmonia Jackson, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought did kill and murder, against the form of the statute in such case made and provided and against the peace and Government of the said United States.

HENRY E. DAVIS,
Attorney of the United States in and for the District of Columbia.

(Endorsed:) No. 21518. United States vs. Edward Smith. Murder. Witnesses: Thomas P. Hartigan, M. P.; A. W. Cox, M. P.; Ruth H. Taylor, Martha Williams, Emma Hutchinson. A true bill. Richard T. Fussell, foreman.

3 Supreme court of the District of Columbia.

TUESDAY, *January 11, 1898.*

The court resumes its session pursuant to adjournment, Mr. Justice Bradley presiding.

* * * * * * *

UNITED STATES *vs.* EDWARD SMITH. } No. 21518. Indicted for murder of Edmonia Jackson.

Come as well the attorney of the United States as the defendant in proper person, in custody of the warden of the jail of the District of

Columbia, and thereupon the defendant being arraigned upon the indictment, he pleads thereto not guilty, and for trial puts himself upon the country, and the attorney of the United States doth the like.

Memorandum.

1898, Feb'y 15.—Jury sworn and respited from day to day until—
1898, Feb'y 17.—Verdict: Guilty as indicted.

Supreme court of the District of Columbia.

FRIDAY, *March 4, 1898.*

The court resumes its session pursuant to adjournment, Mr Justice Bradley presiding.

* * * * * * *

UNITED STATES *vs.* EDWARD SMITH. } No. 21518. Convicted of murder of Edmonia Jackson.

Come as well the attorney of the United States as the defendant in proper person, in custody of the warden of the jail of the District of Columbia, and by his attorney, Warder Voorhees, esq.; whereupon, the defendant's motion for a new trial coming on to be heard, after argument, it is considered by the court that said motion be, and it is hereby, overruled; whereupon the attorney of the United States moves the court to pronounce the sentence of the law in this case, and it is immediately demanded of the defendant what further he has to say why the sentence of the law should not be pronounced against him, and he says nothing except as he has already said; whereupon it is considered by the court that for his said offence the said defendant be taken by the warden aforesaid to the common jail from whence he came and there to be kept in close confinement, and that on Thursday, the twelfth day of May, A. D. 1898, he be taken to the place prepared for his execution, within the walls of the said jail, and then and there, between the hours of ten (10) o'clock antemeridian and one (1) o'clock postmeridian of the same day,
4 he, the said defendant, be hanged by the neck until he be dead; and may God have mercy on his soul; and thereupon the defendant, by his attorney, prays an appeal to the court of appeals of the District of Columbia, which is allowed by the court.

Filed Mar. 5, 1898. J. R. Young, clerk.

In the supreme court of the District of Columbia.

THE UNITED STATES *vs.* EDWARD SMITH. } No. 21518. Criminal.

The President of the United States to Henry E. Davis, Attorney of the United States in and for the District of Columbia, greeting:

You are hereby cited and admonished to be and appear at a court of appeals of the District of Columbia, upon the docketing the cause therein

under and as directed by the rules of said court, pursuant to an appeal noted in open court, of the supreme court of the District of Columbia, on the 4th day of March, 1898, wherein Edward Smith is appellant and the U. S. is *are* appellee, to show cause, if any there be, why the judgment rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 5th day of March, in the year of our Lord one thousand eight hundred and ninety-eight.

[Seal supreme court of the District of Columbia.] JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 5th day of March, 1898.

HENRY E. DAVIS,
Attorney for Appellee,
Per LASKE.

Memorandum.

1898, March 28.—Leave to defendant to prosecute appeal without bond.

Filed April 27, 1898. J. R. Young, clerk.

In the supreme court of the District of Columbia.

THE UNITED STATES OF AMERICA
vs.
EDWARD SMITH. } Criminal. No. 21518.

Defendant's bill of exceptions.

At the trial of this cause, before the Honorable Andrew C. Bradley and a jury, the prosecution offered and gave evidence tending to show that on Friday, November 19, 1897, a police officer found the dead body of Edmonia Jackson, a colored woman about thirty-three years of age, in the ground-floor front room of premises No. 124 Madison alley, NW., in this city; that the body at that time was lying crosswise of a bed in the corner of the room; the mattress on the bed was saturated with blood, and there was a pool of blood on the floor; that on the floor by the bed was found a hatchet covered with blood and containing some particles of hair of a colored person; that at the autopsy, which was performed the next day, it was developed that the body was in a condition that indicated the woman had been dead four or five days; that there was a transverse incised wound in the throat, about four inches long, not very deep, evidently made with a sharp instrument, and two wounds in the back of the neck, to the right, the upper one immediately below the base of the skull, partly separating the skull from the vertebral column, so that the finger could be introduced through the wound into the cavity of the skull, the other, about an inch below the first, similar to it in character, and extending to the vertebral column; that these wounds had the appearance of having been made with a hatchet, and were both fatal wounds; that there was in the palm of the right hand a smooth cut, about two inches long, in which there was embedded

a portion of a blade of a shoemaker's knife; that the portion of the knife blade found in the wound fitted a broken knife found in the defendant's room.

The Government further offered evidence tending to prove that the premises 124 Madison alley were rented by the woman Edmonia Jackson, who lived there with her husband; that the defendant rented from her the ground-floor room; that some time before the homicide, Smith and Edmonia's husband had a quarrel about her and were both arrested upon charges of assault; that Jackson was convicted and sentenced to six months in jail; that Smith demanded a jury trial and had his case postponed from time to time, but was finally tried in August; that the night before he was tried he threatened to kill Edmonia if she ever resumed living with her husband; that the next day Smith was convicted in the police court of assault and sentenced to three months in jail; that during the time Smith and Jackson were in jail together Edmonia frequently visited the jail to see her husband; that Smith saw her on those occasions, and to other prisoners in the jail said he would fix her when he got out; that it would be another case of Strather (referring to a prisoner who was then in jail for killing a woman with a hatchet); that when his term expired on the tenth of November some of the prisoners bid him good-bye, and he said they need not do that because he would be back in a few days, but would be on the other side of the jail (referring to the side where serious offenders were held); that Smith upon being released went to 124 Madison alley and resumed living in his room; that on Saturday, the 13th of November, Edmonia wanted to go to the jail to see her husband and Smith prevented her from going; that on Monday, the 15th, he forbid her to go to the jail and waited around the house until he supposed it was too late for her to go; that after he left Edmonia went to the jail with Martha Williams, a roomer in her house, and did not return until about four o'clock; that Smith came in soon after
6 they returned and accused Edmonia of having been to the jail; that she denied it; that he refused to accept her denial and asked others about the house if she had been to the jail, and was not satisfied with their assurances that she had not; that Edmonia went down to Smith's room about five o'clock, and he was quarrelling with her there; that between six and seven o'clock he and Edmonia were on the front steps of the house and went into the house through the front door, which led into Smith's room; that they were quarreling then; that Edmonia was not seen alive after that; that about twelve o'clock that night the neighbors in 126 Madison alley heard a heavy sound, as if of someone falling, and soon after heard the front door of 124 open and someone pass up the narrow alleyway between 124 and 126, go into the back yard of 124, and turn on the water at the hydrant; that about fifteen minutes later the water was turned off and someone came back down the alleyway and went into 124 through a door that opened into the alleyway; that on Tuesday, the 15th, Smith told Martha Williams that Edmonia had left the house about ten o'clock that morning to go to a service place; that on Wednesday he told Martha, when she asked him at what number Edmonia was working, that he did not know; that it was on Eleventh street; that he was going up there that night to see Edmonia and would tell her the next day the number; that on Thursday he told her Edmonia

was living at 1115 Eleventh street; that she went there to see Edmonia, but found she was not there; that she saw Smith that evening and asked him why he had sent her to 1115 Eleventh street, and he told her she made a mistake; that she should have gone to 1135 Eleventh street, but told her that it was not necessary for her to go there; that Edmonia would be home that night; that she went and found that Edmonia was not at 1135; that Smith was about the premises, 124 Madison alley, every day from Monday until Friday, and was there every night; that on Wednesday night, the 17th, Smith was at the corner of 2nd and F streets, under the influence of liquor; that a neighbor met him and walked home with him; that he had some trouble opening the door; that his neighbor took the key, opened the door leading into the room where Edmonia's body was found, and offered to go into the room with Smith, and Smith refused to permit him to enter; that both doors leading into Smith's room were kept locked; that after his arrest Smith told conflicting stories to the officer of his whereabouts from Monday to Friday; that after his return to the jail Smith stated to a prisoner there that he killed the Jackson woman; and there the prosecution rested.

And thereupon the defendant, to maintain the issue on his part joined, offered and gave evidence tending to show that Mrs. Jackson had not visited the jail at the time prisoners at the jail said she was there, at which times they testified Smith made threats against her; and there the defendant rested.

And thereupon the court, of its own motion, charged the jury as follows:

7 The charge made by the indictment, which is merely a charge, gentlemen of the jury, is that Edmonia Jackson was murdered by the defendant.

Murder, expressed and defined briefly, is the unlawful killing of a human being with malice aforethought. An unlawful killing is a killing that is not justified or excused by law. A lawful killing, for instance, is an execution pursuant to the sentence of a court. It may be a killing in battle or it may be a killing in self-defence.

Malice must be found in the evidence to make out the crime to be murder. That malice may be ascertained and found either in threats or declarations of intention to kill, or it may be presumed from the character of the act and the instrument that was used in accomplishing the death of the victim.

Inasmuch as the use of a deadly weapon may and likely will accomplish death, the law presumes that a man using a deadly weapon in such manner as that it may occasion death intends the natural consequences of his act, and that if death results from such a use of a deadly weapon the party so using the deadly weapon intended to accomplish the death.

A hatchet, used upon the back of the neck, making such wounds as the testimony indicates occasioned the death of Edmonia Jackson, is a deadly weapon. The presumption of the law is that whoever made those wounds upon the back of the neck of that woman made them maliciously.

It appears by the evidence that Edmonia Jackson was killed by two deep wounds that were made in the back of her neck, either one of which was sufficient to have caused death. There is no explanation in the tes-

timony or in the evidence of the circumstances that immediately attended the infliction of those wounds, and you are left only to inferences from the testimony as to matters that preceded the act which accomplished the death of this woman, and to other circumstances that are given in evidence, which followed her death.

No testimony has been offered tending to show that this woman was slain by any person in self-defence. No testimony has been offered tending to show that this woman was slain by anyone in the heat of passion, excited by reasonable provocation. So that you are left to judge of the character of the act that accomplished her death solely by the circumstances that are evidenced by the surroundings of her body and by the nature of the wounds that were inflicted.

The testimony tends to establish the claim of the Government that this woman was murdered. There is no other explanation of her death. The presumption is that it is a case of murder by someone, for there is, as I have said, no explanation of the fact except that explanation which the body of the woman and her surroundings tend to give.

If that be so, and you reach the conclusion that this woman was murdered by some one, the only other inquiry in the case is whether the testimony and the evidence that has been adduced leads you to believe beyond a reasonable doubt that the defendant perpetrated the act.

8 It is not my function nor my purpose at this time to attempt to rehearse the evidence. I shall make no comment upon it. I shall leave it entirely with you, gentlemen of the jury, for you are the sole and exclusive judges of the weight and credibility of the testimony. Much of this testimony is circumstantial; so is much of the testimony in any criminal case. You should not convict this defendant unless you are satisfied and convinced of his guilt; and if, after weighing and considering all the evidence in the case, you have a reasonable doubt of his guilt, you should give him the benefit of that doubt, and return a verdict of not guilty, for the law presumes that every person who is charged with crime is innocent, and it is the duty of the Government and the burden rests upon the prosecution to offer sufficient testimony to convince the minds of the jury and to lead them to believe beyond a reasonable doubt that the defendant is guilty, otherwise this presumption of innocence must prevail, and the only proper verdict would be one of "not guilty."

The question for you to determine is whether all of these circumstances, taken together, convince you that the defendant perpetrated this act.

I have been asked to instruct you, and I so do, that if the circumstances are consistent with any other reasonable hypothesis than the guilt of the defendant, he should not be convicted. But if the reasonable hypothesis of all these circumstances is consistent, and consistent only, with the guilt of the defendant, and if, after considering and weighing all of the evidence, all of these circumstances, you are led to the conclusion, to the conviction, of the guilt of the defendant, your verdict should be, "Guilty as indicted."

[Under a recent statute the jury are authorized, in returning a verdict of guilty of murder, if the evidence justifies them on their consciences in so doing, to qualify the verdict by the addition of the words "without capital punishment."

The law inflicting the penalty of death for murder has not been repealed. That is the penalty which the law fixes. You are not responsible for that penalty; neither am I. The existence of that law is well known to the community. The man who violates the law by committing murder should anticipate the infliction of the death penalty. In so perpetrating murder, he must do it with his eyes open to the consequences. The legislature probably intended that in cases where there were some mitigating or palliating circumstances, where it was apparent from the evidence that the crime was not the most heinous crime of murder, or where there was doubt whether the circumstances indicated premeditation, perhaps, that the jury might qualify their verdict by adding the words "without capital punishment." But it was evidently contemplated by Congress that there would be cases in which juries would not be justified in so qualifying their verdicts, and therefore the law remains, and unless the verdict is so qualified the penalty of the law is unchanged.]

Now, as I have intimated to you, gentlemen of the jury, you are
9 not responsible for the law; neither are you responsible for the act of an individual who brings himself within the pale of the law. If a man makes his bed, he must lie in it. It behooves you and me as officers of the law to do our duty to the man on trial; to see that he is not unjustly convicted; to see that he has the benefit of the presumption of innocence, and to see that he has the benefit of a reasonable doubt if, after the consideration of all the circumstances, you find that there is any reasonable doubt existing in your minds of his guilt; but the duty also rests upon you to see to it that if you find that the defendant is guilty, you will vindicate the law and uphold it by returning a verdict of "Guilty as indicted." Whether you qualify it or not is a matter for you to determine. If you conclude to qualify it, it must be by the unanimous decision of the twelve jurors.

Take the case, gentlemen.

Whereupon the defendant, by his counsel, then and there excepted to that part of said charge which related to the act of Congress, approved January 15th, 1897, entitled "An act to reduce the cases in which the penalty of death may be inflicted," and which is enclosed in brackets above, and the trial justice noted the said exception upon his minutes before the jury retired to consider of its verdict.

And because the aforesaid exception, made and noted as aforesaid, does not appear of record, the defendant, by his counsel, prays the trial justice to sign, seal, and enrol' this his bill of exceptions, which is accordingly done, now for then, this 26th day of April, A. D. 1898.

A. C. BRADLEY, *Justice.* [SEAL.]

Supreme court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing pages, numbered from 1 to 15, inclusive, are true copies of originals in cause No. 21518, criminal, The United States vs. Edward Smith, as the same remains upon the files and records of said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 29th day of April, A. D. 1898.

JOHN R. YOUNG, *Clerk.*

[Seal supreme court of the District of Columbia.]

(Endorsed on cover:) District of Columbia supreme court. No. 797. Edward Smith, appellant, vs. The United States. Court of appeals, District of Columbia. Filed May 3, 1898. Robert Willett, clerk.

10 TUESDAY, *May 17th, A. D. 1898.*

WILLIAM M. STRATHER, APPELLANT, *vs.* THE UNITED STATES; } No. 795.

and

EDWARD SMITH, APPELLANT, *vs.* THE UNITED STATES; } No. 797.

and

CHARLES WINSTON, APPELLANT, *vs.* THE UNITED STATES. } No. 804.

The argument in the above-entitled causes was commenced by Mr. B. T. Roodhouse, attorney for the appellant in No. 795, and was continued by Mr. George Kearney, attorney for the appellant in No. 804, and by Mr. Warder Voorhees, attorney for the appellant in No. 797, and by Messrs. John E. Laskey and D. W. Baker, attorneys for the appellee, and by Mr. Charles H. Turner, attorney for the appellant in No. 804, and was concluded by Mr. Samuel D. Truitt, attorney for the appellant in No. 795.

11 EDWARD SMITH, APPELLANT, *vs.* THE UNITED STATES. } No. 797.

Mr. Chief Justice Alvey delivered the opinion of the court:

Edward Smith was indicted on the 31st of December, 1897, for the crime of murder. The crime is alleged to have been committed on the 15th of November, 1897. The indictment charges that the accused wilfully and feloniously, with malice aforethought, on the date just mentioned, caused the death of one Edmonia Jackson by blows and wounds inflicted by a hatchet. To the indictment the accused pleaded not guilty, and, upon trial, he was found guilty of murder as indicted, by the verdict of a jury. He was thereupon sentenced to be hung, and he has appealed.

The facts of the case are not conflicting, but they are not material to be recited for the decision of the question presented on this appeal. The only question raised by exception is one upon the charge to the jury, whereby the judge below instructed the jury as to the construction and effect of the act of Congress of January 15, 1897, entitled "An act to reduce the cases in which the penalty of death may be inflicted," and as

to the circumstances under which it would be proper or improper for the jury to return a qualified verdict under the statute. The jury were expressly informed by the judge that the question whether the verdict should be a qualified one under the statute or not was a matter alone for their determination; "that the jury were authorized, in returning a verdict of guilty of murder, if the evidence justified them on their consciences in so doing, to qualify the verdict by the addition of the words 'without capital punishment.'"

Whether the court has the right to advise the jury as to the circumstances under which the qualified verdict should or should not be rendered, or whether the jury should be left without instruction, with an unquestioned option to return a verdict of guilty of murder as indicted, or guilty "without capital punishment," in any and all cases, without any reference whatever to the facts and circumstances of the case, is a question that this court has fully considered in the preceding case of Strather v. United States, and our decision in that case fully embraces and disposes of the question raised by the exception in this case. We shall, therefore, following the decision in the preceding case of Strather, affirm the judgment appealed from in the present case; and it is so ordered.

Judgment affirmed.

12 WILLIAM M. STRATTHER, APPELLANT, *vs.* THE UNITED STATES; No. 795.

and

EDWARD SMITH, APPELLANT, *vs.* THE UNITED STATES; No. 797.

and

CHARLES WINSTON, APPELLANT, *vs.* THE UNITED STATES. No. 804.

Dissenting opinion by Mr. Justice Shepard.

I am unable to concur with my brothers in their construction of the act of Congress which provides that when an accused person shall be found guilty of murder "the jury may qualify their verdict by adding without capital punishment."

In my opinion, the language of the act is plain and affords no room for construction—for appeal from its letter to its spirit.

Public policy in respect of the punishment of offenses is a matter within the exclusive control of Congress, and departures therein, whether to be regarded as wise or unwise, must be given effect to as declared.

To my mind it appears plain that whilst Congress did not abolish capital punishment for the crime of murder, it nevertheless committed the matter of its infliction to the uncontrolled discretion of the jury in each case.

If it had been intended that the exercise of this power of commutation of the death penalty should depend upon the court or upon the jury, subject to the advice and admonition of the court, I think it would have been expressly so declared.

Whether, in the exercise of an unlimited discretion, juries may or may not make distinctions between criminals not justified by the conditions of their respective cases, or, in practice, virtually abolish the death penalty, is wholly beside the question. In the exercise of its own undoubted discretion in the premises, Congress has seen proper to commit the power to the jury, and to the jury alone.

13 In construing the statute to mean that the court may, without error, admonish the jury in respect of the grounds upon which they may commute the death penalty by the addition to their verdict, it is not denied that he is compelled also to instruct them that it is their privilege to exercise the power notwithstanding.

With such instructions as were given in this case, no jury, composed of good citizens, accustomed, as it is their duty, to accept and apply the law as given them in charge by the court, could have extended clemency to any one of these appellants.

After such an admonition to such a jury, the further information that they might nevertheless commute the punishment was but a meaningless formality. It did not give the accused the benefit of the statute.

I can not accept as sound the argument that the purpose of Congress in this enactment was substantially the same as shown in the legislation of the States, whereby the offense of murder has been divided into two degrees—murder of the first and murder of the second degree.

On the contrary, it seems to me that there is a substantial difference of purpose. Under the State statutes referred to, murder of the first degree consists of homicide committed in the perpetration of offenses like rape, robbery, arson and burglary, or by poison, starvation, torture, and so forth, showing express malice. All murder not included in the definition of the first is murder of the second degree.

In the enforcement of those statutes the courts are required to declare the law to the jury in application to the facts. Where the evidence shows plainly that the accused, if guilty at all, is guilty of murder of the first degree and nothing less, it is the duty of the court to withhold from the jury the privilege of returning a verdict of guilty of murder of the second degree. The court is not required to submit the question of the degree of guilt to the jury, regardless of the evidence, as under the act of Congress it is compelled to extend to them the privilege of commuting the death penalty.

If the purposes of the two sets of statutes are the same, it would be more reasonable to hold that, under the act of Congress, the right to commute the death penalty should not be accorded to the jury at all, unless the evidence should discover something tending to warrant the exercise of clemency.

For the reasons given, I am of the opinion that the judgment in each case should be reversed.

14 Court of appeals of the District of Columbia. April term, 1898.

EDWARD SMITH, APPELLANT,
vs.
THE UNITED STATES. } No. 797.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said supreme court in this cause be, and the same is hereby, affirmed.

Per Mr. Chief Justice Alvey, June 7, 1898.

Dissenting, Mr. Justice Shepard.

(Indorsed:) Court of appeals of the District of Columbia. April term, 1898. No. 797. Judgment. Court of appeals, District of Columbia. Filed June 7, 1898. Robert Willett, clerk.

15 Court of appeals of the District of Columbia.

I, Robert Willett, clerk of the court of appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 14, inclusive, contain a true copy of the transcript of record and proceedings of said court of appeals in the case of Edward Smith, appellant, vs. The United States, No. 797, April term, 1898, as the same remain upon the files and records of said court of appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said court of appeals, at the city of Washington, this 8th day of October, A. D. 1898.

[SEAL.] ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

(Indorsement on cover:) Case No. 17018. District of Columbia court of appeals. Term No., 433. Edward Smith, petitioner, vs. The United States. Filed October 11, 1898.

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